SEP 3 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-236

HARRY R. HALDEMAN, *Petitioner*

v.

HONORABLE JOHN J. SIRICA, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73

HARRY R. HALDEMAN, *Petitioner*

v.

HONORABLE JOHN J. SIRICA, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harry R. Haldeman petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The district court's (respondent, Judge John J. Sirica's) opinion and order of July 9, 1974, denying petitioner's motion to dismiss the indictment in criminal case No. 74-110, *United States* v. *Mitchell, et al.*

(Appendix A, *infra*, pp. 1a, 2a) and the Court of Appeals' Order of August 14, 1974 (No. 74-1727) dismissing petitioner's petition for mandamus without opinion (Appendix B, *infra*, p. 3a), are not yet officially reported.

JURISDICTION

The order of the Court of Appeals sought to be reviewed dismissed petitioner's petition for mandamus which had been filed on July 16, 1974, pursuant to the All Writs Act, 28 U.S.C. 1651[1] to compel the district court to dismiss the indictment[2] because the term of the grand jury which returned the indictment had expired before the date of its return and was not *lawfully* extended.

The jurisdiction of this Court to review the instant case is invoked under 28 U.S.C. 1254(c), 28 U.S.C. 2101(c), Rule 22 of this Court, and 28 U.S.C. 1651.

QUESTIONS PRESENTED

1. Whether Congress may by special legislation abrogate for a particular case one of the Federal Rules of Criminal Procedure, where it has delegated to the

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[1] The denial of the motion to dismiss the indictment not being a final order, the usual appeal in a criminal case could not be prosecuted.

[2] The indictment is the same one involved in No. 73-1766 *United States* v. *Nixon*, decided by this Court on July 24, 1974. It is in thirteen counts and names seven defendants, this petitioner being one of them. Petitioner is charged in counts 1, 2, 7, 8 and 9, count 1 being conspiracy with all other defendants; count 2 being obstruction of justice (18 U.S.C. 1503) with all defendants except Mardian; and counts 7, 8 and 9 being alleged instances of perjury by petitioner under Section 18 U.S.C. 1621.

Supreme Court complete authority to promulgate and amend such rules, and has thus divested itself of power to change the rules except by repealing or amending the Enabling Act.

2. Whether Congress may amend Rule 6(g) of the Federal Rules of Criminal Procedure by extending the term of a regular grand jury, sitting in the District of Columbia, beyond the maximum 18-month period prescribed by that Rule.

3. Whether the indictment in this case, returned on March 1, 1974, should be dismissed when the "Rule" term expired on December 4, 1973 and the means of extension was an act of Congress approved November 30, 1973 and not an amendment of the rule by this Court.

4. Whether the Act of Congress approved November 30, 1973 was a nullity and, therefore, ineffective to extend the term of the grand jury.

STATUTES AND RULES

The statutes and rules involved, which are set forth in Appendix C, *infra*, pp. 4a-7a, are:

Act of November 30, 1973. Public Law 93-172, 93rd Congress, 87 Stat. 691

28 U.S.C. 2072

18 U.S.C. 3771

18 U.S.C. 3331-4

Rule 6(g), Federal Rules of Criminal Procedure

Rule 26, Federal Rules of Criminal Procedure

STATEMENT OF THE CASE

This case presents for review the denial of a motion to dismiss the indictment in criminal case No. 74-110 in the United States District Court for the District of Columbia, entitled *United States of America* v. *Mitchell, et al.* The ground of the motion, filed by petitioner as one of the indicted defendants, was stated as follows:

> "THE TERM OF THE GRAND JURY EXPIRED ON DECEMBER 4, 1973, AND WAS NOT LAWFULLY EXTENDED TO INCLUDE THE TIME WHEN SAID INDICTMENT WAS VOTED UPON AND RETURNED."

The grand jury was impaneled on June 5, 1972 as a *regular* grand jury, and is known as such. Its term expired according to Rule 6(g) F.R.Crim.P., on December 4, 1973, and could not be extended beyond that date.[3]

Apparently, not being able to obtain this indictment before December 4, 1973, the Department of Justice, in October of that year, at the behest of the Special Watergate Prosecutor, sought the help of Congress to extend the life of the grand jury beyond that date. No attempt was made to persuade this Court to amend the rule. The then Attorney General urged the passage of the desired legislation by letters to each house of Congress.

The legislation resulting in the "extender" act originated as H.R. 10,937. The favorable report of the House Judiciary Committee is No. 93-618, and the favorable report of the Senate Judiciary Committee is

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[3] Rule 6(g) states: "* * * but no grand jury may serve more than 18 months."

No. 93-527.[4] Attorney General Richardson's letters to the Congress are quoted in the two reports. In both letters the following is stated:

> "The present law does not permit judicial extension of the life of a general grand jury. I recognize that statutory extensions have usually been discouraged, but the present case seems sufficiently extraordinary to require an exception. * * *"

The bill passed the Senate without debate. (Cong. Rec. Nov. 19, 1973, vol. 119, No. 178, p. 20699) At the session when the bill passed the House, three pages of discussion are reported in the Congressional Record (pp. 9611-9613, Cong. Rec. Nov. 6, 1973, vol. 119, No. 169). The concern of the members, with one exception, was over the extraordinary nature of the "Watergate case" and what a shame it would be if the work of the June 5, 1972 grand jury was not brought to a conclusion. It was urged that the bill should be passed even if the June 1972 grand jury was not a "special" one under 18 U.S.C. 3331.[5] The exception was the remark of Congressman Hogan of Maryland who stated (p. 9613):

> "At no time in the history of this country has a

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[4] Copies of these two reports are attached to the petition for mandamus and are contained in the record certified to this Court by the Clerk of the Court of Appeals.

[5] Extensions are permitted under the Organized Crime Act of 1970 (18 U.S.C. 3331-1334) when a *special* grand jury has been impaneled and the usual 18-month period proves insufficient for it to complete its investigation. There is no provision in the Federal Rules for a "special" grand jury nor for any grand jury of the type and with the powers of the special grand jury provided for in 18 U.S.C. 3331-3334. The creation of the special grand jury is clearly more a matter of substantive law than it is of procedure. (This statute appears in App. C.)

grand jury of this type served more than 18 months."[6]

The "extender" act provides in the first paragraph thereof as follows:

> "That (a) notwithstanding Rule 6(g) of the Federal Rules of Criminal Procedure, or any other law, rule, or regulation, the term of the grand jury of the United States District Court for the District of Columbia which was impaneled on June 5, 1972, is extended to June 4, 1974."

The vote to indict was subsequent to December 4, 1973, and, as above noted, the indictment was returned on March 1, 1974.

The Enabling Act authorizing this Court to promulgate rules of civil procedure is found in 28 U.S.C. 2072. This section varies only in immaterial respects from the Act as passed originally on June 19, 1934, P.L. 415, 73rd Congress, Chapter 651. The Enabling Act authorizing this Court to prescribe rules of criminal procedure is found in 18 U.S.C. 3771. It, too, varies only in immaterial respects from the Act as passed originally on June 29, 1940, 54 Stat. 688, P.L. 675. The two Acts are substantially similar in text allowing for variations necessary for the respective descriptions of civil procedures and criminal procedures, except that the Enabling Act for civil rules contains the following paragraph which is not in the Enabling Act for Criminal rules:

> "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right

[6] Nothing appears in the Attorney General's letters or in the Congressional discussions which would cast doubt upon Congressman Hogan's comment.

> of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.[7]

Both Acts provide that all laws in conflict with such rules shall be of no further force and effect after such rules have taken effect; and neither Act provides for any action to be taken by Congress during the 90-day period after this Court has reported the rules (or amendments) to Congress.

The Senate Report (No. 1603) upon S.J. Res. 281 (1938) as to the postponing of the effective date of the first set of Civil Rules, states, among other things (p. 1):

> "* * * The act under which the Rules were drawn does not provide for any action by Congress, but, as indicated, merely declares the Rules shall be submitted to Congress; and, in addition, provides (or is interpreted to provide) that when adopted all acts of Congress heretofore passed, and possibly to be enacted hereafter, i.e., regulating practice in the Federal courts, shall no longer be in effect."

To the same effect is Senate Report No. 1491 (1950) upon S. 2874, a bill to change the time of reporting to Congress rules of procedure adopted by the Supreme Court for criminal, civil, and admiralty cases. Therein it stated:

> "Under existing law (18 U.S.C. 3771; 28 U.S.C. 2072) the Supreme Court of the United States prescribes the rules of pleading, practice and pro-

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[7] There can be little doubt that this provision is impliedly a part of 18 U.S.C. 3771, with, of course, the Sixth Amendment being substituted for the Seventh Amendment. However, it is beyond dispute that rule 6(g) is a rule of procedure and does not affect substantive law. See *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14 (1941).

> cedure before the district courts of the United States, and the forms of process, writs, pleadings, and motions. The rules so adopted by the Supreme Court are then reported to the Congress as provided by law. After the required waiting period, such rules then have the force and effect of law. * * * *"

In connection with the order of this Court of January 21, 1963 amending a number of the rules of civil procedure and authorizing the Chief Justice to transmit the amendments to Congress in accordance with the provisions of 28 U.S.C. Sec. 2072, Mr. Justice Black and Mr. Justice Douglas expressed opposition to submission of the amendments to the Congress "under a statute which permits them to 'take effect' and to repeal 'all laws in conflict with such rules' *without requiring any affirmative consideration, action, or approval of the rules by Congress or by the President.*" (Italics supplied.) Earlier remarks are found in 368 U.S. 1012-1014 and 346 U.S. 946-947.

REASONS FOR GRANTING THE WRIT

Mandamus Is an Appropriate Remedy

It is the consensus among the trial judge (respondent), the prosecutor and the defendants and their counsel that the forthcoming trial of the indictment in this case (called the "Watergate case"), now scheduled to begin on September 30th, will last from three to four months. Thus, for this and other reasons, this case is not an ordinary one, nor the trial an ordinary trial. If the indictment is not a valid one because the grand jury's term had expired when the indictment was returned, convictions if occuring would be set aside on appeal, a new indictment returned and a second trial of another three to four months instituted.

This Court entertained a review upon certiorari of a denial of a writ of mandamus where an appeal would not *then* lie, in *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), involving the question as to whether rule 35 of the Federal Rules of Civil Procedure could be invoked to obtain a mental or physical examination of a defendant in a negligence case. This review was had despite the Court's reference to *Ex parte Fahey*, 332 U.S. 258 (1947), where it was held that the writ of mandamus is not to be used as a substitute for an appeal, and to *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953), *United States Alkali Export Assn.* v. *United States*, 325 U.S. 196 (1945) and *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21 (1943), in support of the doctrine that mandamus should be denied even though hardship may otherwise result from delay and a possibly unnecessary trial encountered.

On the other hand, the Court pointed out in *Schlagenhauf* that the writ of mandamus is appropriately issued when there is usurpation of judicial power or a clear abuse of discretion on the part of the trial court, citing *Bankers Life*. And, citing *Roche*, the Court stated that the extraordinary writ has been used in aid of appellate jurisdiction to confine an inferior court *to a lawful exercise of its prescribed jurisdiction*. Thus an unlawful exercise of its prescribed jurisdiction has been equated with a "usurpation of judicial power" or a "clear abuse of discretion."

The respondent may only put petitioner to his trial on a valid indictment. Putting him and his co-defendants to a long trial upon an invalid indictment would be an unlawful exercise of prescribed jurisdiction, or, put another way, such an act would be a usurpation of judicial power.

Thus, it is submitted that mandamus is the proper remedy here.

Congress Had No Power To Extend the Life of the Grand Jury

When Congress passed the Enabling Acts delegating to this Court the rule making power for the federal courts, and reserving no right in itself to exercise that power, except, of course, by repealing or amending the Enabling Act, Congress divested itself of the right to amend Rule 6(g) of the Criminal Rules by extending the life of a regular grand jury beyond 18 months, as limited by the Rule. The Criminal Rules reflect only one exception, and that is Rule 26, where this Court and the Congress share the right to promulgate rules relating to evidence (discovery and the like).[8] Nowhere else in the Rules, or in the history of the Rules, will there be found any other reservation.

This Court has not had occasion to deal with the instant question. To the extent that *Palermo* v. *United States*, 360 U.S. 743 (1959) touches the question here involved in footnote 11 on page 753, it is in conflict with *Davis* v. *United States*, 411 U.S. 233 (1973). However, it is probable that Mr. Justice Frankfurter was speaking in the context of this Court's remarks in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 (1941):

> "Congress has undoubted power to regulate the practice and procedure of federal courts, [citations omitted] and may exercise that power by delegating to this or other federal courts authority to make rules *not inconsistent with* the statutes or Constitution of the United States [same citations omitted]; * * *" (Italics supplied)

[8] The entire series of statutes in 18 U.S.C. 3500-3504 relate to evidentiary matters.

That is to say, "not inconsistent with" the Enabling Act for civil rules which forbade the promulgation of rules relating to substantive law as contrasted with procedure.

Hawkins v. *United States,* 358 U.S. 74 (1958) contains the following statement:

> "* * * But Congress or this Court, by decision or under its rule-making power, 18 U.S.C. §3771, can change or modify the *rule* where circumstances or further experience dictates. *In fact, specific changes have been made from time to time.*" (at 358 U.S.78) (Italics supplied)

The word "rule" in this quotation refers to the rule of law as to whether a wife can testify against her husband in a criminal case, and not to one of the federal criminal rules. Moreover, the second sentence, which is italicized by petitioner, cited no federal rule change in this respect, and, apparently, was not intended to do so. Earlier, in the opinion, p. 77, the Court refers to Rule 26, which, as pointed out herein, allows either Congress or this Court to promulgate rules *relating to evidence matters.*

The Third Circuit, in *Government of the Virgin Islands* v. *Parrott,* 476 F.2d 1058 (1973), cert. denied 414 U.S. 871 [9] holds against petitioner's contention but relies entirely upon the *Hawkins* case.

Isaacs v. *United States,* 351 F.Supp. 1323, 1328 (N.D. Ill. 1972)[10] contains District Judge Taylor's *ipse dixit*

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[9] The Revised Organic Act of the Virgin Islands, involved in *Parrott* was, in effect, a code for the Virgin Islands and thus stands upon an entirely different footing from the case at bar.

[10] Affirmed, without reference to this point, in — F.2d — (7th Cir. Feb. 19, 1974); cert. denied — U.S. —.

to the opposite of petitioner's views without citation of authority, and is in conflict with the legislative history of the Enabling Acts. *United States* v. *Berrigan*, 482 F. 2d 171 (3rd Cir. 1973) and *United States* v. *Marrero*, 450 F.2d 373 (2nd Cir. 1971), cited by Judge Sirica, are either not in point or are supported by Rule 26.

Whatever may be the purpose of the "lay-over" period in Congress of new rules or amendments to old rules, as prescribed by this Court,[11] it should be pointed out that Rule 6(g) was not in that status when Congress passed the "extender" Act last November. It appears that the relevant language in this rule was in the rule when it was originally prescribed years ago.

This Court recently held in *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, citing *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1953), *Service* v. *Dulles*, 354 U.S. 363 (1957) and *Vitarelli* v. *Seaton*, 359 U.S. 575 (1959), that the Attorney General's regulation, delegating certain powers to the Watergate Special Prosecutor, divested the Attorney General of the right to exercise the same powers until and unless he amended or revoked the regulation (pp. 9-11, slip opinion).

The critical thrust of the foregoing, as applied here, is that Rule 6(g) remains in force and must be followed until such time as (1) it is amended by this

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[11] Mr. Justice Roberts explains the purpose in the *Sibbach* case, *infra*, in the following (pp. 14-15):

> "* * * Moreover, in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.
>
> "The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. [citations omitted]."

Court, (2) this Court's delegated authority is recaptured in its entirety by Congress, or (3) there is a valid amendment of the authorizing statute which would permit Congress to make *ad hoc* amendments to the rules.[12] None of these conditions was met by Public Law 93-172.

No basis has been found for drawing a distinction between delegations by Congress to this Court and delegations by the Attorney General to the Special Prosecutor. Indeed, there should be none. In each instance, unless power is reserved to override delegated action, the delegating body cannot interpose itself to achieve a result different from that which the delegate has embodied in a rule of pratcice. See *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959).

This petition presents the issue as to whether, except as to Rule 26, Congress granted to this Court the sole and exclusive power to prescribe, alter, amend or rescind the Federal Rules of Criminal Procedure. This is an important federal question of authority over the Criminal Rules, as between this Court and Congress, not heretofore presented to or passed upon by this Court. The question is compounded by the fact that Congress has indulged in "spot" amending, namely, changing a federal rule in relation to one grand jury in one case for one period of time in one federal district. Uniformity in the application of federal procedure throughout the districts—the aim of the federal rules—has been dissipated by one single piece of novel legislation in the name of expediency.

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[12] In *Accardi* v. *Shaughnessy*, 347 U.S. 260, 270 (1953), the four dissenting members noted an instance where Congress specifically reserved to itself power to overrule the Attorney General's exercise of delegated authority.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to the Court of Appeals to review the dismissal of petitioner's petition for mandamus.

Respectfully submitted,

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Attorneys for Petitioner

September, 1974

APPENDIX

APPENDIX A

Memorandum Order of Judge John J. Sirica Dated July 9, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

JOHN N. MITCHELL, ET AL.

Criminal Case No. 74-110

MEMORANDUM ORDER

[Filed July 9, 1974]

I. MOTIONS TO DISMISS

(1) Motion to dismiss for the alleged unlawful extension of the grand jury term:

Defendants in this motion argue that Congress was without authority to extend the term of the June 5, 1972 grand jury by the simple enactment of a statute, Public Law 93-172, 87 Stat. 691 (November 30, 1973). Pursuant to Rule 6(g) of the Federal Rules of Criminal Procedure, the June 5, 1972 grand jury that returned the indictment herein, would have expired on December 4, 1973. Prior to that deadline, however, Congress enacted the above-referenced law extending the grand jury term to June 4, 1974 subject to another six-month extension. It was during this initial extension that, on March 1, 1974, the instant indictment was returned.

Defendants contend that Congress' 18 U.S.C. § 3771 delegation of power to the Supreme Court to prescribe rules of criminal procedure left the Congress without authority to amend or modify any of the rules so promulgated by the Court once accepted.

The Supreme Court's power to prescribe rules of procedure exists only in the absence of Congressional enactments. *See Palmero (sic)* v. *United States*, 360 U.S. 343, 353, n. 11 (1959). The Court can discern nothing that restricts the power of Congress to repeal, amend, or supersede its delegation of authority under 18 U.S.C. § 3771 or the rules of procedure themselves. The delegation under § 3771 was not so extensive and final that Congress must either revoke the section or wait for the Supreme Court to propose changes before it can modify the federal rules. Changes may be effected at any time by statute. See, *Hawkins* v. *United States*, 358 U.S. 74, 78 (1958), *Government of the Virgin Islands* v. *Parrott*, 476 F.2d 1058 (3rd Cir.) *cert. denied*, 414 U.S. 871 (1973), *United States* v. *Berrigan*, 482 F.2d 171, 176 (3rd Cir. 1973), *United States* v. *Marrero*, 450 F.2d 373 (2nd Cir. 1971), *cert denied*, 405 U.S. 933 (1972), *United States* v. *Isaacs*, 351 F. Supp. 1323, 1328 (N.D. Ill. 1972), *aff'd.* F.2d (7th Cir. Feb. 19, 1974).

The motion to dismiss for alleged unlawful extension of the grand jury is denied.

* * * * * * * * * *

APPENDIX B

Order of U.S. Court of Appeals Dismissing Petition for Mandamus

Dated August 14, 1974

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

No. 74-1727

Criminal No. 74-110

(Filed August 14, 1974)

HARRY R. HALDERMAN, *Petitioner*

v.

Honorable JOHN J. SIRICA, Judge, United States District Court for the District of Columbia, *Respondent*

Before: Bazelon, Chief Judge; Wright, McGowan, Leventhal, Robinson and MacKinnon, Circuit Judges

ORDER

On consideration of petitioner's petition for writ of mandamus, it is

ORDERED by the Court, *en banc*, that the aforesaid petition is denied.

Per Curiam

Circuit Judge MacKinnon would request the Special Prosecutor to respond on the issue of whether it is a denial of due process for Congress, at the request of the Special Prosecutor, to enact special legislation for this case only to authorize continuance of an existing regular Grand Jury, the personnel of which was already fixed and public and whose attitudes were well known to the Special Prosecutor.

APPENDIX C

STATUTES AND RULES

Public Law 93-172

93rd Congress, H.R. 10937

November 30, 1973

AN ACT

To extend the life of the June 5, 1972, grand jury of the United States District Court for the District of Columbia

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That (a) notwithstanding rule 6(g) of the Federal Rules of Criminal Procedure, or any other law, rule, or regulation, the term of the grand jury of the United States District Court for the District of Columbia which was impaneled on June 5, 1972, is extended to June 4, 1974. If the United States District Court for the District of Columbia determines that the business of the grand jury will not be completed by that date, that court is authorized to extend its term for an additional six months.

(b) If the United States District Court for the District of Columbia fails to extend the term of the grand jury beyond the statutory extension period ending June 4, 1974, the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit may extend its term for an additional six months on application by the grand jury upon the affirmative vote of a majority of its members that it has not completed its business. Upon the making of such an application by the grand jury, its term shall continue until the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit enters an appropriate order. In no event shall the term of the grand jury extend beyond December 4, 1974.

Approved November 30, 1973.

LEGISLATIVE HISTORY:

HOUSE REPORT NO. 93-618 (Comm. on the Judiciary).
SENATE REPORT NO. 93-527 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 119 (1973):
Nov. 6, considered and passed House.
Nov. 19, considered and passed Senate.

Rule 6(g) of the Federal Rules of Criminal Procedure

RULE 6

(g) Discharge and Excuse. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

Rule 26, Federal Rules of Criminal Procedure

Rule 26. EVIDENCE. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these Rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

28 U.SC. 2072

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions

of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. As amended Nov. 6, 1966, Pub.L. 89-773, § 1, 80 Stat. 1323.

18 U.S.C. 3771

§ 3771. Procedure to an including verdict

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district court for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of

ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

18 U.S.C. 3331-3334

§ 3331. Summoning and term

(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, or any designated, Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (c) of section 3333 of this chapter.

(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its mem-

bers, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (c) of section 3333 of this chapter.

Added Pub.L. 91–452, Title I, § 101(a), Oct. 15, 1970, 84 Stat. 923.

§ 3332. Power and duties

(a) It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district. Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf of the United States for the presentation of evidence. Any such attorney receiving information concerning such an alleged offense from any other person shall, if requested by such other person, inform the grand jury of such alleged offense, the identity of such other person, and such attorney's action or recommendation.

(b) Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled.

Added Pub.L. 91–452, Title I, § 101(a), Oct. 15, 1970, 84 Stat. 924.

§ 3333. Reports

(a) A special grand jury impaneled by any district court, with the concurrence of a majority of its members,

may, upon completion of its original term, or each extension thereof, submit to the court a report—

(1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or

(2) regarding organized crime conditions in the district.

(b) The court to which such report is submitted shall examine it and the minutes of the special grand jury and, except as otherwise provided in subsections (c) and (d) of this section, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subsection (a) of this section and that—

(1) the report is based upon facts revealed in the course of an investigation authorized by subsection (a) of section 3332 and is supported by the preponderance of the evidence; and

(2) when the report is submitted pursuant to paragraph (1) of subsection (a) of this section, each person named therein and any reasonable number of witnesses in his behalf as designated by him to the foreman of the grand jury were afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (2) of subsection (a) of this section, it is not critical of an identified person.

(c) (1) An order accepting a report pursuant to paragraph (1) of subsection (a) of this section and the report shall be sealed by the court and shall not be filed as a public record or be subject to subpena or otherwise made public (i) until at least thirty-one days after a copy of the order

and report are served upon each public officer or employee named therein and an answer has been filed or the time for filing an answer has expired, or (ii) if an appeal is taken, until all rights of review of the public officer or employee named therein have expired or terminated in an order accepting the report. No order accepting a report pursuant to paragraph (1) of subsection (a) of this section shall be entered until thirty days after the delivery of such report to the public officer or body pursuant to paragraph (3) of subsection (c) of this section. The court may issue such orders as it shall deem appropriate to prevent unauthorized publication of a report. Unauthorized publicatic .. may be punished as contempt of the court.

(2) Such public officer or employee may file with the clerk a verified answer to such a report not later than twenty days after service of the order and report upon him. Upon a showing of good cause the court may grant such public officer or employee an extension of time within which to file such answer and may authorize such limited publication of the report as may be necessary to prepare such answer. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public officer or employee to the charges in said report, and, except for those parts thereof which the court determines to have been inserted scandalously, prejudiciously, or unnecessarily, such answer shall become an appendix to the report.

(3) Upon the expiration of the time set forth in paragraph (1) of subsection (c) of this section, the United States attorney shall deliver a true copy of such report, and the appendix, if any, for appropriate action to each public officer or body having jurisdiction, responsibility, or authority over each public officer or employee named in the report.

(d) Upon the submission of a report pursuant to subsection (a) of this section, if the court finds that the filing of such report as a public record may prejudice fair considera-

tion of a pending criminal matter, it shall order such report sealed and such report shall not be subject to subpena or public inspection during the pendency of such criminal matter, except upon order of the court.

(e) Whenever the court to which a report is submitted pursuant to paragraph (1) of subsection (a) of this section is not satisfied that the report complies with the provisions of subsection (b) of this section, it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report, and it shall not be filed as a public record or be subject to subpena or otherwise made public until the provisions of subsection (b) of this section are met. A special grand jury term may be extended by the district court beyond thirty-six months in order that such additional testimony may be taken or the provisions of subsection (b) of this section may be met.

(f) As used in this section, "public officer or employee" means any officer or employee of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision, or any department, agency or instrumentality thereof.

Added Pub.L. 91–452, Title I, § 101(a), October 15, 1970, 84 Stat. 924.

§ 3334. General provisions

The provisions of chapter 215, title 18, United States Code, and the Federal Rules of Criminal Procedure applicable to regular grand juries shall apply to special grand juries to the extent not inconsistent with sections 3331, 3332, or 3333 of this chapter.

Added Pub.L. 91–452, Title I, § 101(a), October 15, 1970, 84 Stat. 926.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-236

HARRY R. HALDEMAN, PETITIONER

v.

HONORABLE JOHN J. SIRICA,
UNITED STATES DISTRICT JUDGE,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals filed no opinion (Pet. App. 3a).[1] The opinion of the district court (Pet. App. 1a-2a) is not yet reported.

[1] Judge MacKinnon wrote a short statement saying that he would have required a response from the Special Prosecutor.

JURISDICTION

The order of the court of appeals denying mandamus was entered on August 14, 1974. The petition for a writ of certiorari was filed on September 5, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly denied a pretrial petition for a writ of mandamus seeking a dismissal of the criminal indictment in the "Watergate cover-up case", *United States* v. *Mitchell, et al.*, on the ground that the delegation of power by Congress to this Court to promulgate rules of procedure precluded Congress from subsequently enacting a statute to extend the term of the grand jury that later returned the indictment.

STATEMENT

On March 1, 1974, petitioner and six others were indicted in the United States District Court for the District of Columbia,[2] and charged with various offenses including a conspiracy to defraud the United States and to obstruct justice in connection with the earlier "Watergate break-in" case.[3] The indictment was returned by a grand jury empaneled on June 5, 1972, whose term would ordinarily have expired on

[2] *United States* v. *Mitchell, et al.*, D.D.C. Crim. No. 74-110.

[3] *United States* v. *Liddy, et al.*, D.D.C. Crim. No. 1827-72.

December 4, 1973, pursuant to Rule 6(g) of the Federal Rules of Criminal Procedure.

On October 16, 1973, prior to the expiration of the grand jury's term, the Attorney General, at the request of the Special Prosecutor, supported the introduction of a bill, H.R. 10937, 93rd Cong., 1st Sess., to extend the term of the grand jury. The special legislation was sought in order to provide the grand jury with an opportunity to examine and consider the subpoenaed Presidential tapes which had been ordered produced in accordance with the procedures established in *Nixon* v. *Sirica*, 487 F.2d 700 (D.C. Cir. 1973), and to continue and complete its investigation of the so-called Watergate affair. The Attorney General explained that special legislation was being sought because of the "unusual constitutional litigation . . . the character of the crimes, the potential defendants, and the questions of public confidence that they raise." The proposed legislation was also premised on the fact that the grand jury in question had heard dozens of witnesses whose testimony, over the course of an investigation that had spanned more than 15 months, was recorded in thousands of pages of transcript. The original bill would have authorized periods of extension upon a finding by the court that the grand jury had not completed its business. Congress on its part "concluded that the necessity for the extension is so clear and compelling that there is no need to make the initial extension discretionary." Senate Report No. 93-527, pp. 1, 3-4; House Report No. 93-618, 93rd Cong.,

1st Sess., pp. 2-4. On November 30, 1973, the measure was signed into law by President Nixon as Public Law 93-172. On December 3, 1973, the district court entered an order in accordance with the new statute declaring the term of the grand jury extended to June 4, 1974.[4]

On March 1, 1974, after examining the Presidential tapes and hearing other evidence, the grand jury returned the indictment. Thereafter, petitioner filed a motion to dismiss the indictment, alleging that Congress, having previously enacted legislation delegating to this Court the power to prescribe rules of criminal procedure, 18 U.S.C. 3771, did not retain any authority to modify any of the rules promulgated under that delegation, including Rule 6(g), Fed. R. Crim. P. and that, therefore, the statutory extension of the term of the grand jury was a nullity. On July 9, 1974, the district court rejected this contention.

On July 16, 1974, petitioner filed a mandamus petition in the court of appeals raising the same challenge to congressional power to modify one of the Criminal Rules by subsequent legislation. On August 14, 1974, the court of appeals *en banc* denied this petition without requesting any response. (Judge MacKinnon noted that he would have had the Spe-

[4] Under the authority provided by the statute and upon the affirmative vote of the grand jury that it had not yet completed its business, the district court on May 31, 1974, entered an order further continuing the term of the grand jury to and including December 4, 1974. That extension is not at issue here.

cial Prosecutor express his position on whether the legislation extending the life of the grand jury constituted a denial of due process.) The petition for a writ of certiorari followed.

ARGUMENT

In *United States* v. *Nixon*, —— U.S. ——, decided July 24, 1974, this Court reaffirmed the long-standing policy of finality as a prerequisite for review of lower court decisions. It said: "The finality requirement of 28 U.S.C. § 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. * * * This requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation." It is also settled that the strong policy against interlocutory appeals cannot be evaded by resort to the use of the extraordinary writs, as in the present case. See, *e.g.*, *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30 (1943). Mandamus only issues in "exceptional circumstances, amounting to a judicial 'usurpation of power'." *Will* v. *United States*, 389 U.S. 90, 95 (1967).[5] Here, as we show below, there was no "usurpation of power" since respondent judge prop-

[5] This is the third time that one or more of the defendants in the pending Watergate case have sought extraordinary writs. See *Mitchell* v. *Sirica*, No. 73-2001, Oct. Term, 1973, *cert. denied*, July 25, 1974; *Ehrlichman* v. *Sirica*, No. A-93 Misc. this term, application for a stay of trial denied, August 28, 1974.

erly concluded that the congressional delegation of power to this Court to prescribe rules of criminal procedure nevertheless was subject to Congress's residual authority to amend or modify any of the rules so promulgated.

Petitioner does not deny that Congress has the power to enact rules of procedure for the federal courts.[6] Under this power, Congress has delegated to this Court the power to enact rules of criminal procedure both before and after verdict, 18 U.S.C. 3771 and 3772. This legislation, adopted in 1940, provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Pursuant to this legislation, this Court promulgated the Federal Rules of Criminal Procedure, including Rule 6(g) providing that no regular grand jury may serve more than eighteen months.

The language that "[a]ll laws in conflict with such rules shall have no further force or effect" certainly manifests an intent to replace pre-existing procedural legislation on the same issues. But it does not suggest that Congress intended that any future procedural legislation it might consider it appropriate to enact would be a nullity. Nothing in the terms

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[6] See *Funk* v. *United States*, 290 U.S. 371, 381-382 (1933); *Palermo* v. *United States*, 360 U.S. 343, 353, n. 11 (1959). In the exercise of this power, Congress had enacted earlier statutes to regulate and to extend the length of the terms of federal grand juries. See *United States* v. *Johnson*, 319 U.S. 503, 507-513 (1943); *Stillman* v. *United States*, 177 F.2d 607, 611, n. 2 (9th Cir. 1949).

or history of the Enabling Act even implies that Congress did not retain any authority to modify the rules promulgated by this Court under this delegation. Indeed, the fact that no rule prescribed by this Court takes effect until reported to Congress, suggests that Congress intended to retain the ultimate power to act in this area, and there is no reason to conclude that the failure of Congress to modify or cancel a proposed rule at that time forever prohibits Congress from acting on the matter. Even if the language of the 18 U.S.C. 3771 were ambiguous, it would require a clear manifestation of congressional intent to conclude that Congress placed an impediment on its power to legislate (assuming *arguendo* that one Congress could validly prevent a later Congress from taking independent action).[7] And petitioner's argument that Congress had to repeal the Enabling Act entirely or to amend it to *authorize* its enactment of modifications of the Federal Rules (Pet. 13) is simply unsupportable.

Both Congress and the courts have concluded that the promulgation of the Criminal Rules has not re-

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[7] Petitioner refers to a 1938 Senate Report interpreting the 1934 Enabling Act applicable to the promulgation of Civil Rules which states that with the adoption of the Civil Rules "all acts of Congress heretofore passed, and possibly to be enacted hereafter, i.e., regulating practice in the Federal courts, shall no longer be in effect." (Pet. 7) But the fact that this after-the-fact report expressed the "possibility" that statutes thereafter passed might have no effect on the Civil Rules is no indication of congressional intent to try to restrict Congress's power to enact statutes applicable to criminal procedure.

stricted the power of Congress to alter those rules by statute. The lower courts have uniformly ruled that a subsequently enacted statute modifies a criminal rule previously adopted by this Court. See *United States* v. *Moon*, 491 F.2d 1047, 1050 (5th Cir. 1974) (18 U.S.C. § 2518(10)(a) and Rule 41(e)); *Government of Virgin Islands* v. *Parrott*, 476 F.2d 1058, 1060 (3rd Cir. 1973), *cert. denied*, 414 U.S. 871 (1973) (Revised Organic Act of the Virgin Islands and Rule 23(a)); *United States* v. *Issacs*, 351 F. Supp. 1323, 1328 (N.D. Ill. 1972), affirmed, 493 F.2d 1124 (7th Cir. 1974), *cert. denied*, June 17, 1974 (18 U.S.C. 3500 and Rule 16(b)). See also 2 Moore, *Federal Practice* ¶ 1.02(5); 7 Moore, *Federal Practice* ¶ 86.04 [4]; *Palermo* v. *United States*, 360 U.S. 343, 353, n.11 (1959); *Hawkins* v. *United States*, 358 U.S. 74, 78 (1958); *United States* v. *Gustin-Bacon Div. Certain-Teed Prod.*, 426 F.2d 539, 542 (10th Cir. 1970).[8] Recently in the Organized Crime Control Act of 1970, 18 U.S.C. 3331-3334, Congress even provided for special grand juries whose term may be extended beyond the 18-month term normally specified by Rule 6(g) of the Federal Rules.

Petitioner attempts to distinguish these rulings by suggesting that Rule 26 of the Federal Rules of Criminal Procedure contains a special and *limited* recognition of continuing congressional power. That

[8] Other examples of procedural legislation enacted subsequent to the Federal Rules are 18 U.S.C. 3501 (admissibility of confessions), 18 U.S.C. 3502 (admissibility in evidence of eye witness testimony), 18 U.S.C. 3503 (depositions to preserve testimony) and 18 U.S.C. 3504 (litigation concerning sources of evidence).

Rule provides in part that the "admissibility of evidence and the competency and privileges of witnesses shall be governed, *except when an act of Congress* or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" (emphasis added). Apart from the fact that the cases cited above have not been concerned only with statutes altering evidentiary rules, the plain meaning of Rule 26 is that the Court was not at that time adopting any detailed rules of evidence but was leaving such matters to statute and common law principles. In any event, it is certainly anomalous to construct a situation in which Congressional power to legislate depends upon this Court's granting of permission to do so in the exercise of a power that is itself conferred upon the Court by Act of Congress.[9] Significantly in 1972, this Court found it necessary to amend Rule 6(b)(2), Fed. R. Crim. P., dealing with motions to dismiss an indictment because of objections to the grand jury selection, in order to incorporate the procedure provided by the intervening enactment of the Jury Selection and Service Act of 1968.[10]

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[9] Unlike the situation in *United States* v. *Nixon, supra,* where the Attorney General had not revoked the operative regulation, Congress here did explicitly supersede the rule involved.

[10] Nothing in *Davis* v. *United States,* 411 U.S. 233, 241-242 (1973) upon which petitioner relies is contrary to our argument here. The Court merely said:

[Footnote continued on page 10]

Finally, petitioner argues that this is "spot amending" and a "single piece of novel legislation in the *name of expediency," (Pet. 13), apparently suggest*ing without discussion the issue raised by Judge MacKinnon about whether this legislation constituted a denial of due process. See statement of Judge MacKinnon (Pet. App. 3a). But due process could be violated only if the instant legislation were arbitrary or if the special treatment were not rationally justified by legitimate concerns. *Cf. United States* v. *Berrigan*, 482 F.2d 171, 179 (3d Cir. 1973). Here, as we pointed out in our statement, the "unusual constitutional litigation . . . the character of the crimes, the potential defendants, and the questions of public confidence that they raise" justified Congress in enacting the statute at issue. It follows, therefore, that Congress had the authority to extend the life of the grand jury which indicted petitioner even though Rule 6(g) obviously limits the life of a regular grand jury to eighteen months.

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[10] [Continued]

Were we confronted with an express conflict between the rule and a *prior statute*, the force of § 3771, providing that "[a]ll laws in conflict with such rules shall be of no further force or effect," is such that the *prior inconsistent statute* would be deemed to have been repealed. *Cf. Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10 (1941). (Emphasis added.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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